(1)

preme Court, U.S.
FILED

95 • 538 OCT 2 - 1995

No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

In re: BERNARD J. DOLENZ,

Petitioner.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR CERTIORARI

BERNARD J. DOLENZ
6102 Swiss Avenue
Dallas, Texas 75214
(214) 821-0220
TX Bar No. 05957750
Petitioner, Pro Se

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

50 pp

QUESTIONS PRESENTED

ISSUE 1

The Fifth Circuit erred in failing to reverse the judgment of the magistrate judge and remand this action for further proceedings based upon Issue No. 1 in the Brief of Appellant, which provided that the United States District Court Judge and Magistrate erred in failing to remand this civil action back to state court for lack of subject matter jurisdiction because Bernard J. Dolenz and Nationwide Mutual Fire Insurance Company's and Nationwide Indemnity Insurance Company's insured employer, Noel Furniture, Inc., were both citizens of the State of Texas, and therefore, pursuant to 28 U.S.C. Section 1332(c)(1), Nationwide Mutual Fire Insurance Company and Nationwide Indemnity Insurance Company were deemed to also be citizens of the State of Texas. (TR I, 160, 173, 184-6; TR III, 746-763).

ISSUE 2

The Fifth Circuit erred in failing to reverse the judgment of the magistrate judge and remand this action for further proceedings based upon Issue No. 2 in the Brief of Appellant, which provided that the United States District Court Judge and Magistrate erred in failing to remand this civil action back to state court for lack of subject matter jurisdiction because there was no diversity of citizenship between Bernard J. Dolenz, on the one hand, and Nationwide Mutual Fire Insurance Company and Nationwide Indemnity Insurance Company, on the other. (TR I, 160, 173, 184-6; TR III, 746-763).

QUESTIONS PRESENTED – Continued

ISSUE 3

The Fifth Circuit erred in failing to reverse the judgment of the magistrate judge and remand this action for further proceedings based upon Issue No. 3 in the Brief of Appellant, which provided that the United States District Court Judge and Magistrate erred in failing to remand this civil action back to state court for lack of subject matter jurisdiction because neither Nationwide Mutual Fire Insurance Company nor Nationwide Indemnity Insurance Company met its burden of proof on the issue of diversity of citizenship. (TR I, 160, 173, 184-6; TR III, 746-763).

ISSUE 4

The Fifth Circuit erred in failing to reverse the judgment of the magistrate judge and remand this action for further proceedings based upon Issue No. 4 in the Brief of Appellant, which provided that the United States Magistrate erred in granting summary judgment and rendering and ordering the entry of judgment because there was a genuine issue as to whether diversity of citizenship existed at all times material, and therefore, neither Nationwide Mutual Fire Insurance Company nor Nationwide Indemnity Insurance Company was entitled to a judgment as a matter of law. (TR I, 160, 173, 184-6; TR III, 746-763).

QUESTIONS PRESENTED – Continued

ISSUE 5

The Fifth Circuit erred in failing to reverse the judgment of the magistrate judge and remand this action for further proceedings based upon Issue No. 5 in the Brief of Appellant, which provided that the United States District Court Judge and Magistrate erred in failing to remand this civil action back to state court for lack of subject matter jurisdiction because the evidence was legally insufficient to support a finding to the effect that Bernard J. Dolenz was a citizen in a different state other than the state(s) in which Nationwide Mutual Fire Insurance Company and Nationwide Indemnity Insurance Company were citizens. (TR I, 160, 173, 184-6; TR III, 746-763).

ISSUE 6

The Fifth Circuit erred in failing to reverse the judgment of the magistrate judge and remand this action for further proceedings based upon Issue No. 6 in the Brief of Appellant, which provided that the evidence was factually insufficient to support a finding to the effect that Bernard J. Dolenz was a citizen in a different state other than the state(s) in which Nationwide Mutual Fire Insurance Company and Nationwide Indemnity Insurance Company were citizens. (TR I, 160, 173, 184-6; TR III, 746-763).

QUESTIONS PRESENTED – Continued

ISSUE 7

The Fifth Circuit erred in failing to reverse the judgment of the magistrate judge and remand this action for further proceedings based upon Issue No. 7 in the Brief of Appellant, which provided that the United States District Court Judge erred in denying Bernard J. Dolenz' motion to remand back to state court. (TR I, 184-6).

ISSUE 8

This Fifth Circuit erred in holding that the district court had jurisdiction. (Appendix 1)

ISSUE 9

The Fifth Circuit erred in holding that this suit was not a direct action under 28 U.S.C. Section 1332(c)(1). (Appendix 1)

ISSUE 10

The Fifth Circuit erred in failing to reverse the judgment of the magistrate judge and remand this action for further proceedings based upon Issue No. 15 in the Brief of Appellant, which provided that the United States Magistrate erred in granting summary judgment and rendering and ordering the entry of judgment because there were genuine issues as to material facts, and neither Nationwide Mutual Fire Insurance Company nor Nationwide Indemnity Insurance Company was entitled to a

QUESTIONS PRESENTED – Continued

judgment as a matter of law. (TR II, 507-555; TR III, 746-763).

ISSUE 11

The Fifth Circuit erred in failing to reverse the judgment of the magistrate judge and remand this action for further proceedings based upon Issue No. 16 in the Brief of Appellant, which provided that the United States Magistrate erred in granting summary judgment and rendering and ordering the entry of judgment because there were genuine issues as to facts material to Bernard J. Dolenz' claim to set aside the ruling and decision of the Industrial Accident Board (Workers' Compensation Commission) that made an award to him for charges for medical services that he had provided to an injured worker and then to recover the reasonable chafges for such services from Nationwide Mutual Fire Insurance Company and Nationwide Indemnity Insurance Company, and neither of those insurance companies was entitled to a judgment as a matter of law. (TR II, 507-555; TR III, 746-763).

ISSUE 12

The Fifth Circuit erred in failing to reverse the judgment of the magistrate judge and remand this action for further proceedings based upon its holding that Dolenz failed to demonstrate a right to recover. (Appendix 1)

LIST OF PARTIES

The following listed persons have an interest in the outcome of this case:

Bernard J. Dolenz, Appellant/Petitioner, pro se, 6102 Swiss Avenue, Dallas, Texas 75214.

Nationwide Indemnity Insurance Company, Appellee/Respondent, represented by Joseph A. Barbknecht and Michael W. Minton, The Barbknecht Firm, P.C., and Michael Sean Quinn, Zelle & Larson, Dallas, Texas.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
LIST OF PARTIES vi
TABLE OF CONTENTS vii
TABLE OF AUTHORITIES viii
OPINIONS BELOW 1
JURISDICTION 2
STATUTES INVOLVED 3
STATEMENT OF FACTS 4
SUMMARY OF ARGUMENT 6
ARGUMENT 7
CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

American Fire & Cas. Co. v. Finn, 341 U.S. 6 (1951) 10

American Indemnity Co. v. Baumgart, 840 S.W.2d 634 (Tex. App. – Corpus Christi, 1992 rehearing overruled) 13

B. Inc. v. Miller Brewing Co., 663 F.2d 545 (5th Cir. 1981) 9

Bay Ridge Utility District v. 4M Laundry, 717 S.W.2d 92 (Tex. App. – Houston [1st Dist.] 1986, ref. n.r.e.) 13, 14

Benefit Trust Life Ins. Co. v. Littles, 869 S.W.2d 453 (Tex. App. – San Antonio in 1993, no writ) 11

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986) 15, 16

Cloughly v. NBC Bank – Seguin, N.A., 773 S.W.2d 652 (Tex. App. – San Antonio 1989) 13

Duke v. Brookshire Grocery Co., 568 S.W.2d 470 (Tex. App. – Texarkana 1978, no writ) 13, 14

Fano v. O'Neill, 806 F.2d 1262 (5th Cir. 1987) 16

Graffagnino v. Fibreboard Corp., 781 F.2d 111 (Cir. 5, Tex. 1986) 13

Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542 (9th Cir. 1990) 14

Helm v. Zarecor, 222 U.S. 32, 32 S.Ct. 10, 56 L.Ed. 77 (1911) 9

TABLE OF AUTHORITIES – Continued

Page

Hernandez v. Travelers Ins. Co., 489 F.2d 721, cert. denied, 419 U.S. 844, 95 S.Ct. 78, 42 L.Ed.2d 73 (1974) 2, 6

Jones v. Roadway Express Inv., 931 F.2d 1086 (1991) 10

Kay v. Home Indemnity Co., 337 F.2d 898 (1964) 10

Kirby Forest Industries, Inc. v. Dobbs, 743 S.W.2d 348 (Tex. App. – Beaumont, 1987, error denied) 13

Leonard v. Dixie Well Service & Supply, Inc., 828 F.2d 291 (5th Cir. 1987) 14

Methodist Hospitals v. Corporate Communications, Inc., 806 S.W.2d 879 (Tex. App. – Dallas 1991, writ denied) 12

Niles-Bement-Pond Co. v. Iron Moulders Union, 254 U.S. 77, 41 S.Ct. 39, 65 L.Ed. 145 (1920) 9

Northbrook National Ins. Co. v. Brewer, 493 U.S. 6 (1989) 2, 8, 9

Strawbridge v. Curtis, 3 Cranch 267, 2 L.Ed. 435 (1806) 9

Temple Eastex, Inc. v. Old Orchard Creek Partners, Ltd., 848 S.W.2d 724 (Tex. App. – Dallas 1992) 11

Williamson v. United States Department of Agriculture, 815 F.2d 368 (5th Cir. 1987) 15

STATUTES AND OTHER AUTHORITIES

FRCP 56(c) 14

Texas Rules of Civil Procedure, Rule 93, 13 11

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. Section 455(a)(b)(1) 15

28 U.S.C. Section 636(b)(1)(A) 11

28 U.S.C. Section 1332(c) (1982 ed.) 2, 3, 7

28 U.S.C.A. Section 1441(b) 2

28 U.S.C. Section 1445(c) 2, 3, 9

28 U.S.C. Section 1446(b) 10

Texas Workers' Compensation Statute 8307 Section 5 and Article 8307b 3, 11

COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW

Bradley Graves was injured on or about 02/22/89 while employed by Noel Furniture, Inc. of Houston, Texas, and Nationwide was the insurance carrier having workers' compensation coverage for Noel Furniture, Inc. for its employees. Bradley Graves sustained an injury in the course and scope of his employment with Noel Furniture, Inc. The carrier entered into a Compromise Settlement Agreement (CSA) with Bradley Graves on June 3, 1991, and agreed to pay all reasonable and necessary medical expenses resulting from injury to be governed by Art. 8306, 8307, and 8309, as well as to pay for all future medical benefits at the direction of Bernard J. Dolenz, M.D., his referral, or a mutually agreed physician, and would pay the reasonable and necessary future medical expenses ending on 05/09/96, except those not in compliance with Art. 8306, 8307, and 8309. (TR III; 660-661)

The Texas Workers Compensation Commission ordered the carrier to pay Bernard J. Dolenz $6,000.00 on November 18, 1992. Dr. Bernard Dolenz appealed this as he contended that the Board Award was too low for the services rendered up to the time the Board considered the amount due. Dr. Bernard J. Dolenz contends that his fee of $25,624.51 is reasonable and necessary through March 8, 1994 for the treatment rendered Bradley Graves. (TR III; 661)

Dolenz appealed the Board Award by timely filing an appeal with the Board and filing suit in the 101st District Court in Dallas County, Dallas, TX to set aside the Board Award as the $6,000 awarded was too low (TR I; 167).

Nationwide removed this case to federal court by petition on January 8, 1993 (TR I; 1). Dolenz filed a motion to remand this case back to state court on February 16, 1993 (TR I; 158). The remand motion was denied May 11, 1993. An order to transfer this case to Magistrate William Sanderson for the conduct of all further proceedings was entered on August 18, 1993. Nationwide filed a motion for summary judgment on March 15, 1994 (TR II; 409) and Dolenz filed his response on April 1, 1994 (TR II; 507-555). Magistrate Sanderson gave a memorandum opinion and order and judgment that the action be dismissed in favor of Nationwide on July 29, 1994 (TR III; 746-763). Dolenz timely gave his notice of appeal on August 5, 1994 (TR III; 764 and docket sheet p. 1-8). The 5th Circuit affirmed June 9, 1995 and denied the petition for rehearing on July 17, 1995.

JURISDICTION

This Court has jurisdiction pursuant to 28 USCA Section 1254.

The Petitioner contends that complete diversity does not exist in this case per 28 U.S.C. Section 1332 (c) and *Northbrook Nat'l Ins. Co. v. Brewer,* 493 U.S. 6, 8-9 (1989) and *Hernandez v. Travelers Ins. Co.,* 419 U.S. 844; 28 U.S.C.A. Section 1441 (b). Workers' Compensation cases should remain in state court per 28 U.S.C. Section 1445 (c). The Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power.

The Petitioner seeks to set aside the Judgment and Memorandum Opinion and Order filed July 29, 1994 by Magistrate Sanderson, the Affirmation by the Fifth Circuit June 9, 1995, and the denial of the Petition for Rehearing filed July 17, 1995.

STATUTES INVOLVED

28 U.S.C. Section 1332 (c): "(c) For the purposes of this section and Section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: Provided further, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business."

28 U.S.C.A. Section 1445(c): Diversity actions are removable " . . . only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought."

28 U.S.C. Section 1445(c): "a civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States."

Texas Workers' Compensation Act, Article 8307, Sec. 5: " . . . Any interested party who is not willing and does

not consent to abide by the final ruling and decision of said Board shall, within twenty (20) days after the rendition of said final ruling and decision by said Board, file with said Board notice that he will not abide by said final ruling and decision. And he shall within twenty (20) days after giving such notice bring suit in the county where the injury occurred, or in the county where the employee resided at the time the injury occurred . . . , to set aside said final ruling and decision, and said Board shall proceed no further toward the adjustment of such claim, other than hereinafter provided. . . . "

STATEMENT OF FACTS

Bradley Graves was injured while in the course and scope of his employment at Noel Furniture, Inc. in Houston, Texas, sustaining severe injuries to his back, which were diagnosed as relative stenosis (TR VI; 320-321) and which would probably necessitate neurosurgery to his dorsal and lumbar spine to obviate foreseeable paraplegia. To settle Graves' suit, he entered into a Compromise Settlement Agreement (CSA) (TR III; 739) in which Bernard J. Dolenz, M.D., was to be paid all past and future medical benefits for reasonable and necessary expenses resulting from Mr. Graves' injury (TR III; 703-745).

Following the CSA, Graves was refused by Nationwide to have neurosurgical consultations and care recommended at the direction of Dr. Bernard J. Dolenz (TR II; 515-539).

When Graves was refused his medical treatment, he assigned his torts to Bernard J. Dolenz as consideration to be seen further as the carrier had not paid for the past medical care given to Graves, and was not paying for his future medical care (TR II; 520 and TR III; 729-738). Dolenz received a favorable award of $6,000 from the Texas Workers' Compensation Commission on November 18, 1992 for outstanding medical on Graves (TR III; 745). Dolenz timely appealed this Award to the Dallas County District Court and added other causes of action against Nationwide pursuant to the assignment from Bradley Graves; this complaint was amended (TR III; 703-745).

Dolenz contends that the federal court should have remanded this case back to state court as there is a diversity issue. In this regard, Noel Furniture, Inc.'s address is 11398 Westheimer, Houston, TX 77077. Furthermore, under STIPULATIONS: "In a conversation with Michael Minton, we have agreed that Bradley Graves was injured on or about 02/22/89 while employed by Noel Furniture, Inc. of Houston, Texas, and that Nationwide was the insurance carrier having workers' compensation coverage for Noel Furniture, Inc." Pursuant to Chief Judge Barefoot Sanders, which opinion was attached to the plaintiff's motion to remand back to state court, Nationwide, as insurer of Texas citizens, should be considered a citizen of Texas for the purposes of claims against it based on its coverage (TR I; 173).

SUMMARY OF ARGUMENT

The magistrate judgment dismissed all of Appellant's claims based upon its holding that the assignment of various causes of action was unenforceable. What the magistrate judge and Fifth Circuit overlooked or misapprehended was that Appellant brought this action not only in his capacity as an assignee, but also in his capacity as an "appellant" of an award from the Texas Workers' Compensation Commission. The Texas Workers' Compensation Commission had ordered Appellees to pay $6,000.00 to Appellant. Appellant was dissatisfied with the amount of such award, and accordingly, he appealed such award by filing this action in a district court in the State of Texas pursuant to the Texas Workers' Compensation statute. The issue of enforceability of the assignment was immaterial as to the appeal from the Commission's award because such aspect of the case was based upon Appellant's personal rights.

Here Dr. Dolenz timely appealed his Board award of $6,000 as it was insufficient for the extensive care given. Dr. Dolenz was also a third party beneficiary as the CSA with Graves and Nationwide intended to create a third party beneficiary, with the intent clearly and fully spelled out in the terms of the CSA. That Dr. Dolenz additionally had privity of contract is through the assignment given by Graves as consideration for continuing his treatment.

The Fifth Circuit must have overlooked its opinion in *Hernandez v. Travelers Ins. Co.*, 489 F. 2d 721 (5th Cir. 1974), *cert. denied*, 419 U.S. 844 (1974). Such opinion is exactly on point, and under its holding, it is clear that the district court lacked subject matter jurisdiction. Appellant's

"appeal" of the Commission's award was clearly a DIRECT ACTION within the meaning of 28 U.S.C. Section 1332 (c)(1).

ARGUMENT

ISSUE NOS. 1-9 RESTATED

The federal court lacked subject matter jurisdiction and diversity and should have remanded this civil action back to the state court as all the parties are citizens of Texas and the carrier, Nationwide Mutual Fire Insurance Company and Nationwide Indemnity Insurance Company, has not met its burden of proof on the issue of diversity of citizenship.

In the motion to remand back to state court, (TR I; 158-175), the diversity issue had been made clear in Chief Judge Barefoot Sanders' opinion, in a similar case, on 173 which was appended to the motion to remand which in pertinent part states:

> " . . . Dolenz attacks diversity, arguing that INA is a citizen of Texas for the purposes of this case.
>
> The Court agrees. The relevant subject matter jurisdiction statute is clear: INA, as insurer of Texas citizens allegedly treated by Dolenz, also is considered a citizen of Texas for the purposes of claims against it based on its coverage. See 28 U.S.C. Section 1332 (c); *Northbrook Nat'l Ins. Co. v. Brewer,* 493 U.S. 6, 8-9 (1989).
>
> Therefore, complete diversity does not exist in this case".

Northbrook National Ins. Co. v. Brewer, 493 U.S. 6, discusses the burden of workers' compensation patients in the U.S. District Courts, and that 28 USC 1332(c) indicated that a corporation shall be deemed a citizen of any state by which it has been incorporated and of the state where it has its principal place of business. The *Northbrook* holding, supra, does not elevate the order denying this workers' compensation case to include lack of diversity problems.

Brewer, supra, at 14 states:

> " . . . In 1974, in *Hernandez v. Travelers Ins. Co.,* 489 F. 2d 721, cert. denied, 419 U.S. 844, 95 S. Ct. 78, L. Ed. 2d 73 (1974), the Court of Appeals held that a workers' compensation policy is a "policy or contract of liability insurance" and that an action against an insurer on such a policy is a "direct action" within the meaning of 28 U.S.C., Section 1332(c) (1982 ed) . . . That section provides: "(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: Provided further, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business".

Brewer, supra, at 17 reiterates diversity jurisdiction:

> " . . . to sustain diversity jurisdiction there must exist an 'actual,' *Helm v. Zarecor*, 222 U.S. 32, 36 [32 S. Ct. 10, 12, 56 L.Ed 77], 'substantial', *Niles-Bement-Pond Co. v. Iron Moulders Union*, 254 U.S. 77, 81 [41 S. Ct. 39, 41, 65 L. Ed. 145], controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side. *Strawbridge v. Curtiss*, 3 Cranch 267 [2 L. Ed. 435].

When the court refused to remand this case back to state court, the district court's refusal could not be reviewed unless and until a final judgment had been entered. *B. Inc. v. Miller Brewing Co.*, 663 F. 2d 545 (5th Cir. 1981). *Miller Brewing Co.* emphasizes the burden of proof, giving many citations at 548, 549 and concludes:

> " . . . it is the party who argues jurisdiction upon the court who must always bear the burden of demonstrating that the case is one which is properly before the federal tribunal".

The *Miller* court also footnotes at 547:

> "FN3 28 U.S.C.A. Section 1441(b) provides for the district court's removal jurisdiction. This code section clearly states that "diversity" actions are removable " . . . only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought".

Congress has intended that workers' compensation cases remain in state court. 28 U.S.C. Section 1445(c) provides that,

> "(a) civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States". *Jones v. Roadway Express Inc.*, 931 F.2d 1086 (1991) embellishes this statute and quotes the 5th Circuit in *Kay v. home Indemnity Co.*, 337 F.2d 898, 901 to the effect that workers' compensation cases have no place in federal jurisdiction.

Diversity does not exist when the suit was filed in state court and the defendant should not be able to "create" federal jurisdiction later. A case is removable on diversity grounds if diversity of citizenship can be ascertained from the face of plaintiff's complaint . . . or this fact is disclosed in other pleadings, motions or papers "from which it may . . . be ascertained that the case is one which is or has become removable". 28 U.S.C. Section 1446(b).

Lack of subject matter jurisdiction can be raised at any time and defects in subject matter jurisdiction can be raised for the first time on appeal. *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951).

The above cases support the plaintiff/appellant's contention that this case had no business in federal court and should have been remanded back to state court.

ARGUMENT REGARDING ISSUES 10 & 11

The Magistrate erred in granting summary judgment and rendering and ordering an entry of judgment because there were genuine issues as to material facts, including the appeal of a Board Award from the Industrial Accident Board (Texas Workers' Compensation Statute 8307 Section

5 and Article 8307b); issue whether the assignment made to the *Dolenz Clinic* was enforceable and whether the Magistrate had the power to render Summary Judgment.

The United States District Court Judge erred in delegating this case to Magistrate Sanderson as 28 U.S.C., Section 636(b)(1)(A) indicates that "a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, *for judgment on the pleadings, for summary judgment*, . . . " (Emphasis added).

Magistrate Sanderson lacked jurisdiction and the power as Bernard J. Dolenz only agreed and consented to having the Magistrate conduct a jury trial (TR I; 188, 193).

Article 8307, Section 5 of the Texas Workers' Compensation Act allows for a suit to set aside final rulings of the Board. Dr. Dolenz perfected his appeal and did all the conditions precedent necessary to maintain this cause of action, which are presumed to be true unless denied by verified pleadings. Article 8307b of the TWCA. Texas Rules of Civil Procedure 93, 13 requires a denial to offset the presumptions; Nationwide has given no such denial. This issue needs to be adjudicated as a matter of right per Article 8307, Sec. 5.

Furthermore, Dr. Dolenz is a third-party beneficiary of a contract (CSA of Graves and Nationwide), and is entitled to bring an action on the contract. *Temple Eastex, Inc. v. Old Orchard Creek Partners, Ltd.*, 848 S.W.2d 724, 730 (Tex. App. – Dallas 1992, writ denied). From the CSA the contracting parties had the intent to crate a third-party beneficiary and that this intent is clearly and fully spelled out in the terms of the contract of CSA. *Benefit Trust Life*

Ins. Co. v. Littles, 869 S.W.2d 453, 463 (Tex. App. – San Antonio 1993, no writ). A party breaches a contract when the party fails or refuses to perform an act that it expressly promised to perform. *Methodist Hospitals v. Corporate Communications, Inc.*, 806 S.W.2d 879, 882 (Tex. App. – Dallas 1991, writ denied), Dr. Dolenz pled that Nationwide has a contractual duty to pay him the fair and reasonable costs of medical treatment administrated to Bradley Graves as a third-party beneficiary; Nationwide has not conclusively established that there is no material fact question concerning Dolenz's breach of contract cause of action.

Magistrate Sanderson vitriolically attacks the assignment of Graves to Dr. Dolenz. If carriers like Nationwide would not deprive and interfere with patient's care by allowing what they have contracted for in settlements, allow appropriate consultation and neurosurgery, and obviate the hassle of inordinate pain, assignments would not be necessary. Who gets sued for malpractice when a procedure that requires specialty care wherein paraplegia is foreseeable? Therapy needs to be continued as abandonment of a patient is beneath the standard of care as the insurance carrier and adjuster are "not available" when tragedy occurs.

Since the carrier's adjusters have power over the healthcare destiny of its maimed employees of its insureds through "medical management", which is often in conflict with the physician's medical advice, the injured employee is at risk particularly as in this case where healthcare has been compromised and interfered with by the adjuster.

The assignment procedure gives the *Dolenz Clinic* some protection for continuing to involve itself in appropriate medical care when there is significant disagreement as to treatment. The "cookbook" approach to medicine as used by many adjusters does not work. The political and economic forces that are driving medicine into mediocrity are currently being vigorously and vitriolically debated nationally as this Court knows.

All contracts in general are assignable. *Cloughly v. NBC Bank – Seguin, N.A.*, 773 S.W.2d 652 (Tex. App. – San Antonio 1989); *Kirby Forest Industries, Inc. v. Dobbs*, 743 S.W.2d 348 (Tex. App. – Beaumont, 1987, error denied); *American Indemnity Co. v. Baumgart*, 840 S.W.2d 634 (Tex. App. – Corpus Christi, 1992 rehearing over-ruled). Even an asbestos injury case was properly assigned, not withstanding that the assignment occurred prior to the injured party's death. *Graffagnino v. Fibreboard Corp.*, 781 F.2d 111 (Cir. 5, Tex. 1986).

Tort claims of various types are assignable. Such claims include claims for personal injuries *Duke v. Brookshire Grocery Co.*, 568 S.W.2d 470, 472 (Tex. App. – Texarkana 1978, no writ) and injuries to the assignor's business or property *Bay Ridge Utility District v. 4M Laundry*, 717 S.W.2d 92, 96 (Tex. App. – Houston [1st Dist.] 1986, ref. n.r.e.).

In *Bay Ridge Utility District v. 4M Laundry*, 717 S.W.2d 92 (Tex. App. – Houston [14th Dist.] 1986, writ ref'd n.r.e., this Court held that "assignment of things in action is now the rule and noneassignability the exception . . . " at 96, and indicated that even a civil rights action was assignable.

Furthermore, tort claims are assignable and there is no statute that is found forbidding the assignment of various types of torts. *Duke*, supra and *Bay Ridge Utility District, supra.*

The Magistrate went beyond the standard of review as a summary judgment may be granted on the "pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any" submitted in connection with the motion. FRCP 56(c). Such evidence must be admissible under rules governing admission of evidence generally. *Leonard v. Dixie Well Service & Supply, Inc.* (5th Cir. 1987), 828 F.2d 291, 295; *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.* (9th Cir. 1990), 896 F.2d 1542, 1555.

While the Magistrate discusses the professional code regarding attorneys, transference phenomenon in psychiatry, various opinions from the American Medical Association (AMA), and various cases in which Bernard Dolenz has been involved in, either as an attorney representing clients or a couple of cases in which Dolenz was the plaintiff, none of this is in the record and should not be considered. Certainly, there has been no probative evidence that transference occurred, that the AMA has any legal precedents or application to this case, or how or why the cases involving Dolenz are even before the Magistrate.

The facts are:

1) Bernard Dolenz never represented Bradley Graves as an attorney in this workers' compensation case.

> 2) There is no evidence that any transference existed. Such speculation is not based on personal knowledge and is improperly conclusory in nature. FRCP 56 requires that evidence be made on personal knowledge and portions that do not comply are entitled to no weight. *Williamson v. United States Department of Agriculture,* 815 F.2d 368, 383 (5th Cir. 1987).

Dolenz treated Graves primarily for his neurological illness as Dolenz is trained as a neurologist; that Dolenz is a psychiatrist and attorney is a plus for his patient, Bradley Graves, rather than being a negative as the carrier would imply. In this regard, the wisdom of Cicero is respected: "When you have a weak case, attack your adversary's character".

Since much of the memorandum opinion is based on materials outside the record, it should be excluded. This begs the question about who provided the prejudicial materials to the Magistrate and whether the Magistrate should have disqualified himself because of personal bias or prejudice concerning the plaintiff pursuant to 28 U.S.C. Section 455(a)(b)(1).

ARGUMENT FOR ISSUE 12

In its opinion, the Fifth Circuit asserted that "Dolenz failed to demonstrate a right of recovery." Appellant understands such statement to be grounded upon the opinion in *Celotex Corporation v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548 (1986). The *Celotex* standard is inapplicable because nowhere in Appellees' motion for summary judgment did Appellees point out that there was any lack of evidence on the aspect of case that had to do with

whether the health care services that Appellant had provided to the injured worker in question were necessary and the charges for those services were reasonable, (i.e., the appeal of the Commission's award). Appellant had no duty to put on evidence under *Celotex* unless Appellees had specifically pointed out such an absence of evidence. *Fano v. O'Neill,* 806 F.2d 1262 (5th Cir. 1987).

CONCLUSION

For the reasons discussed above, Bernard J. Dolenz respectfully prays that the judgment of the Magistrate be set aside, that this case be remanded back to state court for lack of subject matter jurisdiction and diversity with costs against carrier, Nationwide, and such other and further relief to which Bernard J. Dolenz may show himself to be justly entitled.

Respectfully submitted,

BERNARD J. DOLENZ
6102 Swiss Avenue
Dallas, TX 75214
(214) 821-0220
TX Bar No. 05957750
Petitioner, Pro Se

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10735

BERNARD J. DOLENZ,

Plaintiff-Appellant,

versus

NATIONWIDE INDEMNITY
INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

(3:93-CV-0049-G)
(Filed Jun. 9, 1995)

Before HIGGINBOTHAM and PARKER, Circuit Judges, and McBRYDE*, District Judge.

PER CURIAM:**

---

*District Judge of the Northern District of Texas, sitting by designation.

**Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

We are persuaded that the district court had jurisdiction, and this suit was not a direct action under 28 U.S.C. § 1332(c)(1). We affirm the grant of summary judgment. Dolenz failed to demonstrate a right to recover. We agree with the judgment entered by the magistrate judge, but not with his rationale insofar as it rested upon broadly stated views of public policy.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BERNARD J. DOLENZ Plaintiff, V. NATIONWIDE INDEMNITY INSURANCE COMPANY Defendant.	§ § § § § § § §	No. 3-93CV0049-AH (Filed July 29, 1994)

JUDGMENT

This action came on for hearing before the court, Honorable William F. Sanderson, Jr., United States Magistrate Judge, presiding, and the issues having been duly heard, and a decision having been duly rendered on Defendant's motion for summary judgment,

IT IS ORDERED AND ADJUDGED that the Plaintiff Bernard J. Dolenz take nothing, that the action be dismissed on the merits and that the Defendant recover of the Plaintiff its costs of court.

Signed and entered this 29th day of July, 1994.

/s/ Wm. F. Sanderson, Jr.
William F. Sanderson, Jr.
United States
Magistrate Judge
Certified a true copy of an instrument on file in my office on 8-24-94 NANCY DOHERTY, Clerk, U.S. District Court Northern District of Texas
By /s/ Barbara Stapp Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BERNARD J. DOLENZ, Plaintiff,	)	
v.	)	3:93-CV-0049-AH
NATIONWIDE INDEMNITY INSURANCE COMPANY, Defendant.	)	(Filed July 29, 1994)

MEMORANDUM OPINION AND ORDER

Pursuant to the District Court's Order of Transfer in accordance with 28 U.S.C. § 636(c) filed August 18, 1993, and written consent of the parties to proceed before a United States magistrate judge, came on this day to be considered Defendant's motion for summary judgment filed March 15, 1994, Plaintiff's statement in opposition filed April 1, 1994, Defendant's objections to Plaintiff's evidence opposing summary judgment filed April 7, 1994, Defendant's reply to Plaintiff's statement in opposition filed April 11, 1994, Defendant's supplemental motion for summary judgment filed June 28, 1994 and Plaintiff's response thereto filed July 8, 1994, and the court finds and orders as follows:

On or about February 22, 1989 Bradley Graves suffered an on-the-job injury to his back after which he sought psychotherapy from Plaintiff, Bernard J. Dolenz, M.D.[1] (Plaintiff's First Amended Complaint pp. 1-3). Dr.

---

[1] Dr. Dolenz is licensed to practice medicine in the State of Texas and is a Diplomate of the American Board of Neurology

Dolenz provided treatment for Graves beginning June 6, 1990 and continuing to the present time. (Plaintiff's First Amended Complaint p.24 & Exhibit "A"). Although a portion of Dr. Dolenz' fees have been paid by Nationwide, Graves currently has an outstanding balance of $25,624.51 in medical bills payable to Dr. Dolenz. *Id.*

On July 13, 1990, Graves executed an authorization for payment of medical benefits from his insurer directly to Dr. Dolenz. (Plaintiff's Trial Exhibit No.9). During the course of treating Graves, Dr. Dolenz, who in addition to being a physician is an attorney licensed to practice law in Texas,[2] took an assignment of bad faith claims[3] from Graves as follows:

---

and Psychiatry. (Plaintiff's Statement of Genuine Issues and Opposition to Motion for Summary Judgment, Affidavit of Bernard J. Dolenz ¶ 2).

[2] Dr. Dolenz received his medical degree from the University of Oklahoma in 1957 and his law degree from South Texas College of Law in 1983. (Plaintiff's Statement of Genuine Issues and Opposition to Motion for Summary Judgment, Affidavit of Bernard J. Dolenz, Exhibit "A").

[3] The assignment of bad faith claims from Graves to Dr. Dolenz is not dated and the actual date of execution is in dispute. (See Brief in Support of Defendant's Motion for Summary Judgment p.6). Dr. Dolenz first testified in his deposition on December 17, 1993 that the assignment was probably signed by Graves on July 5, 1990 when Graves first came to see him because this is the current standard practice for his office. (Defendant's Motion for Summary Judgment, Declaration of Counsel Michael W. Minton, Exhibit "1,", p.73-75). However, in his affidavit, Dr. Dolenz states that Graves executed the original assignment on or about August 21, 1991. (Plaintiff's Statement of Genuine Issues and Opposition to Motion for Summary Judgment, Affidavit of Bernard J. Dolenz ¶ 4).

> Realizing that there is a substantial risk in having the medical services paid by insurance carriers, and because of this risk of payment, and for consideration of the DOLENZ CLINIC in taking this risk which has been fully explained to me, I hereby assign to the DOLENZ CLINIC any and all of my potential bad faith claims wherever so grounded in law including but not limited to violations of the Texas Insurance Code such as Article 21.21 and Article 21.21-2, the Texas Deceptive Trade Practices Act and 28 Tex. Admin. Code, Section 21.203. This also applies to unconscionable acts and actions grounded in Texas common law.
>
> This assignment applies only to bad faith types of actions. I understand that I am not waiving my rights for recovery of actual damages for my injuries and/or punitive damages as they may apply.

(Plaintiff's Trial Exhibit No.9).

Bradley Graves entered into a Compromise and Settlement Agreement ("CSA") with Nationwide on June 3, 1991. (Plaintiff's Trial Exhibit No.2). Pursuant to the CSA, Nationwide agreed to pay $30,000.00 to Graves with an additional $15,000.00 to be paid if Graves had surgery for spinal stenosis within two years of the executed agreement. *Id.* Nationwide also agreed to pay for reasonable and necessary future medical expenses related to Graves' injury "except those not in compliance with Article 8306, 8307 and 8309." *Id.*

Pursuant to his assignment of claims from Bradley Graves, Dr. Dolenz filed suit against Nationwide in the 101st District Court in Dallas, Texas. On January 8, 1993

Defendant Nationwide filed its notice of removal. Dr. Dolenz filed his motion to remand on February 16, 1993 which was denied by the District Court on May 11, 1993 as untimely.

On or about March 7, 1994, as a result of Defendant's challenge to the validity of Graves' original assignment, Graves executed a new and more inclusive assignment of claims to Dr. Dolenz which purports to replace the original assignment as follows:

> Realizing that there is a substantial risk in having the medical services paid by insurance carriers, and because of this risk of payment, and for consideration of the DOLENZ CLINIC in taking this risk which has been fully explained to me, I hereby assign to the DOLENZ CLINIC **any and all of my potential claims, including but not limited to, bad faith claims wherever so grounded in law** including, but not limited to violations of the Texas Insurance Code such as Article 21.21 and Article 21.21-2, the Texas Deceptive Trade Practices Act and 28 Tex. Admin. Code, Section 21.203. This also applies to unconscionable acts, **tortuous interference of the doctor/patient relationship, breach of contract, negligent breach of contract, punitive damages,** and actions grounded in Texas common law.
>
> **I understand that I am not waiving my rights for recovery of actual damages for my personal injuries.**
>
> **This assignment is to replace the earlier assignment granted to the DOLENZ CLINIC since Nationwide's position has been that the first assignment was defective.**

Id. (changes emphasized).

In his *pro se* complaint, Dr. Dolenz seeks redress "on behalf of Bradley Graves as assignor (sic), as well as the beneficiary of the worker's compensation benefits . . . " (plaintiff's First Amended Complaint p.1). Dolenz advances the following legal theories for recovery against Nationwide:

(1) suit on sworn account;

(2) breach of contract and negligent breach of contract;

(3) tortuous interference with a contract;

(4) quantum meruit;

(5) fraud;

(6) constitutional relief for wrongs done;

(7) breach of duty of good faith and fair dealing, and;

(8) exemplary damages and statutory damages.

(Plaintiff's First Amended Complaint). In addition to Graves; medical bills and the unspecified actual and punitive damages sought for the above-mentioned claims, Dolenz seeks to recover "no less than" $25,000.00 in attorneys fees. (*Id.* at p.24).

In Texas, contracts are generally assignable unless the assignment is contrary to public policy or the contract involves a matter of trust and confidence. *In re Martin*, 117 B.R. 243, 248 (Bankr. N.D. Tex. 1990). Unless prohibited by statute, the right to receive funds under a contract is generally assignable as long as such assignment does not contravene public policy. *Id.* at 249. Many states,

including Texas, allow an insured to assign insurance policy benefits in exchange for a covenant not to execute.[4] *See Foremost County Mut. Ins. Co. v. Home Indem. Co.*, 897 F.2d 754, 759-60 (5th Cir. 1990); *Young Men's Christian Ass'n of Metro. Ft. Worth v. Commercial Standard Ins. Co.*, 552 S.W.2d 497, 504-05 (Tex. Civ. App. – Fort Worth 1977, writ ref'd n.r.e.).

In some circumstances, an insured may also properly assign his causes of action against his insurer for negligence, gross negligence, violations of the Texas Deceptive Trade Practices Act and violations of the Texas Insurance Code. *See Allstate Ins. Co. v. Kelly*, 680 S.W.2d 595, 610 (Tex. App. – Tyler 1984, writ ref'd n.r.e.) (validating assignment of cause of action to judgment creditor). However, a cause of action related to recovery of punitive damages for a personal claim (not a tort against property) is not assignable in Texas. *Bay Ridge Utility Dist. v. 4M Laundry*, 717 S.W.2d 92, 97 (Tex. App. – Houston [1st Dist.] 1986, writ ref'd n.r.e.); *see also, First Nat'l Bank of Kerrville v. Hackworth*, 673 S.W.2d 218 (Tex. App. – San Antonio, no writ). To recover as an assignee in Texas, one must plead and prove (1) that a cause of action existed at the time of the assignment, (2) that the cause of action

---

[4] Nowhere do the assignments from Graves to Dr. Dolenz definitively release Bradley Graves from any contractual liability to ultimately pay for the medical services rendered to him by Dr. Dolenz. *See Smith v. Stephenson*, 641 S.W.2d 900, 902 (Tex. 1982) (holding that an employee may be liable for medical bills upon a finding by the Industrial Accident Board (now the Texas Workers' Compensation Commission) that the insurance carrier is not obligated); Tex. Labor Code Ann. § 413.042 (Vernon Pamph. 1994).

was capable of being assigned, and (3) that the assignment was made to the party alleging the theory of assignment. *Pape Equip.*, 737 S.W.2d 397, 399 (Tex. App. – Houston [14th Dist] 1987, writ ref'd n.r.e.); *Esco Elevators*, 670 S.W.2d 761, 764 (Tex. App. – Fort Worth 1984, writ ref'd n.r.e.).

Although it is unclear as to precisely when each of the various causes of action alleged by Dr. Dolenz arose, it is unnecessary to address that issue because Bradley Graves' purported assignments violate public policy and the Workers' Compensation Act (Tex. Labor Code Ann. § 401.001 *et seq.* (Vernon Pamph. 1994)) and are thereby void as a matter of law and unenforceable by Plaintiff. Whether Plaintiff's conduct in the present case violated the ethical standards of either the legal or medical professions is not at issue in this case, and the court expressly declines to address the same. Nonetheless, the standards applied to such practitioners set the parameters under which public policy relating to assignments is determined.

Recognizing that the practice of law, by its very nature, often gives rise to conflicts between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interests, the State Bar of Texas has promulgated the Texas Disciplinary Rules of Conduct[5] which establish minimum standards of conduct below which an

---

[5] Supreme Court of Texas, State Bar Rules art. X, § 9 (Texas Disciplinary Rules of Professional Conduct) Rule 1.01 *et seq.* (1989) [hereinafter "DR ___"] (located in the 1994 pocket part for Volume 3 of the Texas Government Code in title 2, subtitle G app., following § 83.006 of the Government Code).

attorney cannot fall without being subject to disciplinary action. Texas Disciplinary Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities, No.7. The Rules define proper conduct on the part of attorneys through imperative provisions cast in terms of "shall" or "shall not." *Id.* at No.10. Interpretive guidance is provided by principles developed in the Comments to the Rules. *Id.* at No.7.

Texas Disciplinary Rule 1.08, entitled "CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS," provides, in section (h), that:

> A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
>
> (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and
>
> (2) contract in a civil case with a client for a contingent fee that is permissible under Rule 1.04.

DR 1.08(h).

DR 1.08 (formerly DR 5-103) is a preventive rule which does not require a showing of actual harm to the client. *State v. Baker*, 539 S.W.2d 367, 373 (Tex. Civ. App. – Austin 1976, writ ref'd n.r.e.). It unequivocally prohibits attorneys from acquiring a proprietary interest in the subject matter of litigation.[6] *Id.* The purposes of DR 1.08

---

[6] While a properly worded contingent fee contract may effect an assignment of a portion of the recovery and part of the

are to (1) avoid the possibility of adverse influence upon the attorney and (2) to prevent harm to the client.[7] *Id.*

At common law, the rules of champerty and maintenance prohibited the acquisition of a proprietary interest in the litigation of another by an attorney. Comment to DR 1.08, No. 7. Considered "officious intermeddling," common law champerty was an agreement whereby a person without an interest in another's litigation undertook to carry on the litigation at his own expense in exchange for a portion of any proceeds. *Martin v. Morgan Drive Away, Inc.*, 665 F.2d 598, 603 (5th Cir. Unit A Jan. 11, 1982), *cert. dism'd*, 458 U.S. 1122, 103 S.Ct. 5 (1982). Although the common law rules regarding champerty and maintenance are not in force in Texas, *Yellow Cab Co. v. McCloskey*, 82 S.W.2d 1042, 1043 (Tex. Civ. App. – San Antonio 1935, writ dism'd), Comment No. 7 to DR 1.08

---

cause of action to a lawyer, the lawyer's interest is wholly derivative from that of the client. *Dow Chemical Co. v. Benton*, 163 Tex. 477, 357 S.W.2d 565 (1962); State Bar of Texas Professional Ethics Committee, Opinion No. 395 (1979). Absent inducements from the opposing party which interfere with the attorney-client relationship, a lawyer may not prosecute the action on his own to realize his contingent fee. *Id.* Likewise, it is improper for a lawyer to take from his client a power of attorney purporting to give the lawyer control of the case. State Bar of Texas Professional Ethics Committee, Opinion No. 395 (1979).

[7] The Texas State Legislature has also taken affirmative steps to prevent harm to potential litigants through enactment of the barratry statute, Texas Penal Code § 38.12 (Vernon Supp. 1994). The purpose of the barratry statute is to protect vulnerable and unknowing individuals from improper and overreaching conduct on the part of lawyers. *Enochs v. Brown*, 872 S.W.2d 312, 318 (Tex. App. – Austin 1994, no writ) (citing *Lopez v. State*, 846 S.W.2d 90, 95 (Tex. App. – Corpus Christi 1992, pet. ref'd)).

reflects that DR 1.08 is based upon such common law principles.

Dr. Dolenz holds the distinction of being not only a medical doctor specializing in psychotherapy and neurology, but also an attorney licensed to practice law in the State of Texas. Since his graduation from law school in 1983, Dr. Dolenz has gained a significant amount of experience as a practicing attorney and as a *pro se* litigant.[8] As

---

[8] *See, e.g., Hudson v. Winn*, 859 S.W.2d 504 (Tex. App. – Houston [1st Dist.] 1993, writ denied) (affirming directed verdict for defendant); *Dolenz v. American General Fire & Cas. Co.*, 798 S.W.2d 862 (Tex. App. – Dallas 1990, writ denied) (affirming judgment in favor of Dolenz (appellant), but sanctioning him for bringing a frivolous appeal); *Dolenz v. Pulse*, 791 S.W.2d 572 (Tex. App. – Dallas 1990 writ dism'd w.o.j.) (affirming directed verdict for defendant); *Society of Mary's Stars, Inc. v. State*, 748 S.W.2d 320 (Tex. App. – Fort Worth 1988, writ denied) (affirming judgment in favor of state); *Employers Mut. Cas. Co. v. Gimble*, 842 F.2d 77 (5th Cir.) (affirming judgment for Employers), *cert. denied*, 488 U.S. 956, 109 S.Ct. 394 (1988); *Dolenz v. A – B –*, 742 S.W.2d 82 (Tex. App. – Dallas 1987, writ denied) (affirming judgment for A – B – and sanctioning Dolenz for filing a frivolous appeal); *Dolenz v. Southwestern Bell Telephone Co.*, 730 S.W.2d 44 (Tex. App. – Houston [14th Dist.] 1987, no writ) (reversing trial court's dismissal for want of jurisdiction and remanding); *Employers Mut. Cas. Co. v. Coxsey*, 718 S.W.2d 426 (Tex. App. – Fort Worth 1986, writ dism'd) (reversing trial court's injunction prohibiting action in other courts); *Employers Mut. Cas. Co. v. Street*, 707 S.W.2d 277 (Tex. App. – Fort Worth 1986, no writ) (overruling motion for rehearing); *Employers Mut. Cas. Co. v. Street*, 702 S.W.2d 779 (Tex. App. – Fort Worth 1986, no writ) (denying mandamus relief); *Franecke v. Dolenz*, 668 S.W.2d 481 (Tex. App. – Austin 1984, writ dism'd) (reversing default judgment against appellant and remanding); *Dolenz v. National Bank of Texas at Fort Worth*, 649 S.W.2d 368 (Tex. App. – Fort Worth 1983, writ ref'd n.r.e.) (affirming trial court's take nothing

an attorney licensed to practice in Texas, Dr. Dolenz is subject to the Texas Disciplinary Rules of Professional Conduct. *See* Texas Disciplinary Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities, Nos. 7 & 8.

Even though Dr. Dolenz' relationship with Bradley Graves was initially established in the context of psychotherapist and patient, this court is of the opinion that the public policy originally manifested in the common law principles of champerty and maintenance and currently embodied in DR. 1.08 prohibits Dr. Dolenz, the attorney, from acquiring proprietary interests in the potential tort claims of his patients. Such a restriction serves to bring the conduct of business into harmony with the ethical practice of the legal profession as mandated by the Texas Disciplinary Rules of Professional Conduct. *See McCloskey v. Tobin*, 252 U.S. 107, 108, 40 S.Ct. 306, 306 (1920) (upholding Texas barratry statute as a valid protection against the same evil from which the English law sought to protect the community through proceedings for barratry and champerty). Texas lawyers are clearly prohibited from taking assignment of their clients' tort claims. The fact that an employment relationship with a potential legal client was first established through medical treatment does not serve to vitiate public policy nor does it serve as a means by which to circumvent the Texas Disciplinary Rules.

---

judgments on both plaintiff's claims and defendant's counterclaims).

In his oral deposition taken December taken December 17, 1993, Dr. Dolenz testified that, because of payment delays, unnecessary paperwork and the "hassle factor" of dealing with insurance carriers, he requires all patients to assign their potential bad faith claims to him "as a condition to be seen." (Declaration of Counsel, Michael W. Minton, Exhibit No.1, p.74). Texas Penal Code § 38.12(a)(3) prohibits a person who is acting with intent to obtain an economic benefit from advancing anything of value to a prospective client to obtain legal representation from the prospective client. While this statutory proscription is not strictly applicable since Dolenz purported to obtain the patient's causes of action by assignment rather than seeking to represent the patient as his attorney, the provisions buttress those of DR 1.08 to the effect that an attorney performing services as a medical practitioner cannot condition the providing of medical service on the patient's agreement to assign his tort claims to the doctor-attorney. Moreover, the assignment of an interest in a claim under the Workers' Compensation Act is prohibited by the Act itself. *National Farmers Union Property and Cas. Co. v. Degollado*, 844 S.W.2d 892, 899 (Tex. App. – Austin 1992, writ denied).

With regard to Dr. Dolenz, the physician, the American Medical Association (AMA) Council on Ethical and Judicial Affairs has directly addressed the issue at bar. In its 1992 edition of the *Code of Medical Ethics, Current Opinions*, intended as an adjunct to the revised Principles of Medical Ethics adopted at the annual convention of the AMA House of Delegates in 1980, the Council on Ethical and Judicial Affairs explains:

> If a physician's fee for medical service is contingent on the successful outcome of a claim, there is the ever-present danger that the physician may become less of a healer and more of an advocate. Accordingly, a physician's fee for medical services should be based on the value of the service provided by the physician to the patient and not on the uncertain outcome of a contingency that does not in any way relate to the value of the medical service.

American Medical Association, Council on Ethical and Judicial Affairs, *Code of Medical Ethics, Current Opinions*, p.29, No. 6.01 (1992). This opinion on medical ethics represents neither etiquette nor custom, rather it is one of the many "professional responsibilities and obligations of physicians." *Id.* at p.vii.

The assignment of Bradley Graves' bad faith claims, exacted by Dr. Dolenz in exchange for medical treatment because of the purported "hassle factor" in collecting from insurance carriers, clearly represents a contingency that does not in any way relate to the value of the medical services provided to Graves by Dr. Dolenz. Thus, Dr. Dolenz' requirement that his patients assign to him their potential bad faith claims as a condition of treatment violates the professional responsibilities and obligations of a physician as set out in the standards of medical ethics adopted by the American Medical Association.

To the extent that Dr. Dolenz considers the assignment of bad faith claims as compensation for his efforts as an attorney in dealing with the "hassle factor" of securing payment for medical services from insurance

carriers, such compensation is also contrary to public policy in the state of Texas.

Texas Disciplinary Rule 1.04, entitled "FEES," provides in part that:

> A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable.

DR 1.04(a). Comment No.8 to DR 1.04 provides guidance with which to determine whether or not a fee is unconscionable as follows:

> Two factors in otherwise borderline cases might indicate a fee may be unconscionable. The first is overreaching by a lawyer, particularly of a client who was unusually susceptible to such overreaching. The second is a failure of the lawyer to give at the outset a clear and accurate explanation of how a fee was to be calculated. For example, a fee arrangement negotiated at arm's length with an experienced business client would rarely be subject to question. On the other hand, a fee arrangement with an uneducated or unsophisticated individual having no prior experience in such matters should be more carefully scrutinized for overreaching. While the fact that a client was at a marked disadvantage in bargaining with a lawyer over fees will not make a fee unconscionable, application of the disciplinary test may require some consideration of the personal circumstances of the individuals involved.

Since the assignments at issue do not relate to fees for legal services rendered, DR 1.04(a) does not literally

apply, but is instructive on the issue of whether they contravene public policy. Here the patient, Bradley Graves, has purportedly assigned all caused of action, including claims for punitive damages, to his physician in exchange for only that portion of the patient's medical care which has not previously been reimbursed from medical insurance coverage.[9] A comparison of the amount of uncompensated medical claims to the damages which Plaintiff seeks to recover reflects that the latter exceeds the former many times over, but even absent such factor the context in which the assignments were made – that of a person seeking medical care – irrespective of the patient's sophistication in understanding how legal services are normally charged or paid, strongly suggests that Mr. Graves and Dr. Dolenz, the attorney and plaintiff, were not negotiating on equal footing when Graves bargained away his legal claims in exchange for medical services.

In reviewing the assignments in the context of public policy the court takes cognizance of the fact that Plaintiff was providing psychotherapy to his assignor. Much has been written about the relationship between a psychotherapist and his patient. *See, e.g.*, D. Borys, K. Pope, *Dual Relationships Between Therapist and Client: A National Study of Psychologists, Psychiatrists, and Social Workers*, 20 Professional Psychology 283 (1989). Inherent in this relationship is the well known psychological phenomenon of transference. *See e.g., Simmons v. United States*, 805 F.2d 1363,

---

[9] Whether the assignments constitute releases of claims by the Dolenz Clinic against Graves for services rendered is at best problematic. *See* n.4, *supra*.

1364-65 (9th Cir. 1986). Transference denotes the emotional process whereby a patient projects feelings, thoughts and wishes onto a therapist who has come to represent a significant attachment figure from the past, usually a parent, and responds to the therapist accordingly. *Id.; Cluett v. Medical Protective Co.*, 829 S.W.2d 822, 828 (Tex. App. – Dallas 1992, writ denied); *Lenhard v. Butler*, 745 S.W.2d 101, 103 n.1 (Tex. App. – Fort Worth 1988, writ denied). Touted as one of the most important discoveries of Sigmund Freud, transference is "perhaps regarded as the most significant concept in psychoanalytical therapy." *Simmons v. United States*, 805 F.2d at 1364 (quoting Noyes & Kolb, *Modern Clinical Psychiatry* 505 (6th ed. 1963)).

Therapists are expected to avoid exploiting the vulnerability of their client patients. This duty has been characterized as rising to the level of that of a fiduciary. A. Stone, *Law, Psychiatry, and Morality* 194 (1984). Because transference creates an imbalance in the relationship between therapist and patient similar to that of parent and child, courts have uniformly regarded a psychotherapist's exploitation of a patient as malpractice or gross negligence. *Simmons v. United States*, 805 F.2d at 1365 (citations omitted).

Considering the emotional state of a psychotherapy patient as evidenced by the phenomenon of transference, this court is of the opinion that an individual undergoing psychiatric care may be unusually susceptible to overreaching by a lawyer who is also the patient's psychotherapist. With regard to the assignment in the case at bar, if construed as a fee for legal services to collect

insurance benefits and tort claim damages, the assignment fails to provide a clear and accurate explanation of how such a fee was calculated. Public policy embodied in Disciplinary Rule 1.04 renders the assignments from Graves to Dr. Dolenz null and void. Public policy in this regard is not necessarily informed by the specific facts in a given case, but rather by a recognition that the potential for abusive exploitation is so prevalent in assignments arising in such contexts that they should not by enforced.

Further, to the extent that Graves' assignments purport to assign insurance policy benefits to Dr. Dolenz, such assignments in this case are void. Except for some procedural matters, not relevant here, the rights and liabilities of parties to a claim under the Texas Workers' Compensation Act are entirely controlled by statute. *Smith v. Stephenson*, 641 S.W.2d 900, 902 (Tex. 1982). The Texas Workers' Compensation Act clearly prohibits the assignment of benefits in a non-death case. Act of May 5, 1983, 68th Leg., R.S., ch. 131, § 1, 1983 Tex. Gen. Laws 613, 613 (Tex. Rev. Civ. State. Ann. art. 8306 § 3(b) (since repealed; see now Tex. Labor Code Ann. §§ 408.201 & 408.202 (Vernon Pamph. 1994))); *National Farmers Union Property and Cas. Co. v. Degollado, supra*, 844 S.W.2d at 899. Accordingly, Dr. Dolenz' claim, based upon his status as an assignee of Worker's Compensation benefits are barred by statute.

To the extent that Dr. Dolenz seeks judicial redress for the cost of medical services provided to Bradley Graves, the Workers' Compensation Act requires that a physician exhaust administrative remedies after which he may initiate legal action against his patient. *Smith v.*

Stephenson, 641 S.W.2d 900, 903 (Tex. 1982); Tex. Labor Code Ann. §§ 413.031 and 413.042.

Summary judgment is proper when pleadings and evidence on file, along with any affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(c). The party moving for summary judgment bears the burden of producing evidence to establish that there is no genuine issue of material fact with regard to an essential element of the nonmovant's case. *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 82 (1992). Once the movant produces such evidence, the burden shifts to the nonmovant to produce evidence establishing each of the challenged elements of his case for which he will have the burden of proof at trial. *Id.* In responding, the nonmovant must set forth specific facts which demonstrate that there is a genuine issue for trial. *Id.* at 1132. Otherwise, summary judgment in favor of the movant is appropriate. *Id.*

The summary judgment evidence before this court establishes that, there being no genuine issues of material fact, Defendant is entitled to summary judgment as a matter of law. Accordingly, Defendant's motion for summary judgment is GRANTED.

For the foregoing reasons, it is ORDERED, ADJUDGED and DECREED that Defendant's Motion for Summary Judgment is GRANTED and that Plaintiff Bernard J. Dolenz take nothing in this suit.

It is further ORDERED, ADJUDGED and DECREED that costs be taxed against Plaintiff.

It is further ORDERED that within twenty (20) days from the date of this order, counsel for Defendant shall prepare a proposed judgment in accordance with this Memorandum Opinion and Order.

A copy of this order shall be transmitted to Plaintiff and counsel for Defendant.

ENTERED this 29th day of July, 1994.

/s/ Wm. F. Sanders, Jr.
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10735

BERNARD J. DOLENZ,

Plaintiff-Appellant,

versus

NATIONWIDE INDEMNITY
INSURANCE COMPANY,

Defendant-Appellee.

Petition for Review of an Order of the
Northern District of Texas

ON PETITION FOR REHEARING

(JUL 17, 1995)

Before HIGGINBOTHAM and PARKER, Circuit Judges, and McBRYDE, District Judge*

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/ Illegible
United States Circuit Judge

---

*District Judge of the Northern District of Texas, sitting by designation.

Security No. 429-99-5976 Date of Injury 2-22-89

Employer Noel Furniture, Inc.

Carrier Nationwide Mutual Insurance Company

Periods of Lost Time: From 2-22-89 To present

18a(s) penalties included in CSA: $

Ok Gregg 6-4-91

An [illegible] equal to $ 1500.00, and attorney's expenses of $ 0 are hereby approved.

This 06 day of JUN, 19 91

J. E. Chapman

Balance Due Claimant $ 22,500

NOTICE TO CLAIMANT: Attorney's fees and expenses will be deducted from your settlement; however, by state law the Board must approve all fees and expenses. If your attorney deducts more than approved, follow the instructions on the reverse side of this form.

INDEMNITY: We agree to compromise and settle this claim for workers' compensation insurance for the sum of thirty thousand dollars and, the event surgery in regards to the spinal stenosis is performed within two (2) years of this CSA, an additional fifteen thousand dollars ($ 30,000/15,000 to be paid in addition to $ 28,560.00 already paid will be paid.

$ 0 has been advanced to the claimant and will be subtracted from the amount to be paid the claimant.

RECEIVED
JUN 4 1991
TEXAS WORKERS' COMPENSATION COMMISSION
FORT WORTH

PAST MEDICAL BENEFITS: Carrier (Carrier or Claimant) will pay or has paid all reasonable and necessary accrued hospital and medical expenses whether known or unknown resulting from the injury [ ] with no exceptions. [X] except it is further stipulated this CSA shall be governed entirely by Articles 8306, 8307 and 8309.

FUTURE MEDICAL BENEFITS: Carrier (Carrier or Claimant) will pay for all reasonable and necessary future hospital and medical expenses, if any, resulting from this injury rendered by or at the direction of Bernard J. Dolenz, M.D., his referral, or a mutually agreed physician (Health Care Provider) during the period ending on 5-29-96 (Date) [ ] with no exceptions. [X] except those not in compliance with Article 8306, 8307 and 8309.

GENERAL PROVISIONS: We have read, understood and agreed to all provisions of this agreement, including the provisions listed on the REVERSE SIDE. We understand further that this agreement is made voluntarily. This agreement incorporates by reference all provisions stated on the reverse side.

Signed at Richardson, Texas on the 3rd day of June, 1991

Signature of Witness or Attorney (if any)	Signature of Claimant	Signature of Carrier Representative
Brent S. Freefield	Robert Bradley Graves	Marsha Rowlison
Printed Name of Attorney: Brent S. Freefield	If Claimant is unrepresented, give daytime phone number: ( ) -	Printed Name of Carrier Representative: Marsha Rowlison
Attorney's Texas Bar No.: 07447350		Adjuster's License No.: 000-11-7155

APPROVAL NOTICES WILL BE MAILED TO TYPED OR LEGIBLY PRINTED ADDRESSES BELOW (ALL BLANKS MUST BE COMPLETED)

Attorney (If Any)	Claimant	Company
Brent S. Freefield	Robert Graves	Nationwide Insurance Company
Mailing Address: 1595 N. Central Exp.	Mailing Address: RT 5, Box 980	Mailing Address: P.O.Box 101515
City, State, Zip: Richardson, Tx 75080	City, State, Zip: Burleson, TX - 76028	City, State, Zip: San Antonio, TX 78201-9515

IAB 13 (REV. 9-87) HART GRAPHICS, INC.

105

SEND FIRST 4 COPIES INTACT WITH CARBON AND STUB TO INDUSTRIAL ACCIDENT BOARD.

1

REORDER 14-4 HART GRAPHICS, II

BEST AVAILABLE COPY

TEXAS WORKERS' COMPENSATION COMMISSION

SOUTHFIELD BUILDING, 4000 SOUTH IH-35, AUSTIN, TEXAS 78704-7491

AWARD

EMPLOYEE
Robert Graves
Route 5, Box 980
Burleson, TX 76028

Brent S. Freufield, Attorney
1595 N. Central Expressway
Richardson, Tx 75080

INSURANCE NUMBER	WC NUMBER
78 015631 LT14	89-064711-D1
DATE OF INJURY: On or about 02-22-89	
EMPLOYER: Noel Furniture, Inc.	

INSURANCE CARRIER
✓ Nationwide Mutual Fire Insurance Company
P. O. Box 26534
Chimney Corners Station
Austin, TX 78731

MCE: Harris & Harris

MEDICAL BILLS ONLY

App. 25

On date of hearing after due notice to all parties, came the above claim for compensation to be considered by the Texas Workers' Compensation Commission, and the Executive Director finds and orders: (only Findings, Orders, etc. X'd in appropriate space below apply.)

X 1. Finds that on the date of injury said employer was either a subscriber, authorized self-insured, or had provided workers' compensation coverage in Texas by virtue of Article 8306, Section 18, R.C.S. That said employer was insured with the insurance carrier, or self-insured, as named above.

2. Finds that on the date of injury, the said employee sustained an injury or occupational disease in the course of employment with said employer.

3. Finds that on the date of injury the named individual was an employee of the employer named above.

4. Finds that the employee's average weekly wage on date of injury was $ which produced a compensation rate of $

5. Orders named carrier or self-insured to pay employee $ per week for consecutive weeks for total temporary disability beginning on

6. Orders named carrier or self-insured to pay employee $ per week for consecutive weeks (following payment of compensation, if any for total disability) for

7. Finds that manifest hardship and injustice would result by the denial of a lump sum payment. Therefore, named carrier or self-insured is ordered to pay compensation awarded herein in lump sum payment, less previous payments of compensation, if any. (Statutory 4% annual compound discount is allowed on unaccrued compensation ordered paid in lump sum.)

8. The Executive Director hereby approves an attorney(s) fee of of the unpaid portion of the award, excluding medical expenses, and attorney(s) expenses in the amount of $

X 9. Special Findings and Orders:

ORDERS: Named carrier to pay Bernard J. Dolenz, M.D., an independent claimant, to the extent of $6,000.00, excess denied.

X Award continued...

This is the final award. If you are dissatisfied with this award and desire to appeal it, you must give the Commission written notice within twenty (20) days from the date the award is entered and, in addition, you must within twenty (20) days after giving such notice, bring suit in a proper court to perfect the appeal.

This award is entered on the 18th day of November, 19 92

113

TODD K. BROWN
Executive Director

RECEIVED
NOV 19 1992
HARRIS & HARRIS

If you have any questions, contact Formal Hearing Department at (512)448-7970
Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491

BEST AVAILABLE COPY

TEXAS WORKERS' COMPENSATION COMMISSION

AWARD ENTERED November 18, 1992

EMPLOYEE
- Robert Graves

INSURANCE NUMBER	WC NUMBER
78 015631 1.T14	89-064711-D1

cc: Bernard J. Dolenz, M.D.
1719 West 10th Street
Dallas, TX 75208

App. 26

BEST AVAILABLE COPY

114

RECEIVED
NOV 19 1992
HARRIS & HARRIS

Supreme Court, U.S.
FILED
NOV 1 1995
OFFICE OF THE CLERK

(2)

No. 95-538

In The

Supreme Court of the United States

October Term, 1995

In re: BERNARD J. DOLENZ,

Petitioner.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL W. MINTON
Counsel of Record
THE BARBKNECHT FIRM, P.C.
Attorneys for Respondent
12222 Merit Drive, Suite 990
Dallas, Texas 75251-2227
(214) 385-1818

7689
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTION PRESENTED

Did the court of appeals correctly hold that this bad faith action was not a direct action as defined under 28 U.S.C. § 1332(c).

PARTIES TO THE PROCEEDINGS

Petitioner, Bernard J. Dolenz, 6102 Swiss Avenue, Dallas, Texas 75214, is an individual.

Respondent, Nationwide Indemnity Insurance Company, is an Ohio corporation wholly owned by Nationwide Mutual Insurance Company, an Ohio corporation.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statute Involved	2
Statement of the Case	2
Summary of the Argument	3
Reasons for Denying the Writ	3
I. Suits for insurer bad faith are not direct actions within the meaning of 28 U.S.C. § 1332(c).	4
II. Summary judgment was properly granted for Respondent because Respondent's proof clearly established that there was no genuine issue for trial.	6
Conclusion	7

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Beckham v. Safeco Ins. Co. of America, 691 F.2d 898 (9th Cir. 1982) 5, 6

Fortson v. St. Paul Fire & Marine Ins. Co., 751 F.2d 1157 (11th Cir. 1985) 5

John Cooper Produce Co., Inc. v. Paxton Nat'l Ins. Co., 774 F.2d 433 (11th Cir. 1985) 5

Searles v. Cincinnati Ins. Co., 998 F.2d 728 (9th Cir. 1993) 5

Tuck v. United States Automobile Association, 859 F.2d 842 (10th Cir. 1988) 5

Williams v. Liberty Mutual Insurance Company, 468 F.2d 1207 (5th Cir. 1972) 4

Statutes Cited:

28 U.S.C. § 1332(c) ..... i, 2, 3, 4, 5

28 U.S.C. § 1332(c)(1) 4

Rule Cited:

Sup. Ct. R. 14.4 2

No. 95-538

In The

Supreme Court of the United States

October Term, 1995

In re: BERNARD J. DOLENZ,

Petitioner.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, Nationwide Indemnity Insurance Company, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioner, Bernard J. Dolenz.

OPINIONS BELOW

This suit was originally brought in the 101st Judicial District Court of Dallas County, Texas and was removed to the United States District Court for the Eastern District of Texas based on diversity of citizenship. Petitioner failed to file a motion to remand based on his assertion that this is a worker's

compensation case until thirty-nine days after Nationwide filed its notice of removal.

After referral to a magistrate judge, Nationwide's motion for summary judgment was granted on July 29, 1994. The United States Court of Appeals for the Fifth Circuit affirmed the district court's grant of summary judgment on June 9, 1995.

STATUTE INVOLVED

The statute in issue here is 28 U.S.C. § 1332(c).

STATEMENT OF THE CASE

Contrary to the assertions of Petitioner, this is not a worker's compensation case. Petitioner's failure to accurately present to this Court the nature and basis of the claims is itself sufficient reason to deny certiorari. Sup. Ct. R. 14.4. Petitioner, a psychiatrist and attorney, brought suit against Respondent based partly on claims in his individual capacity and partly on claims which he was allegedly assigned by Bradley Graves as a prerequisite to being seen as a patient. (R.Vol. I; 4). According to the face of his original petition, Petitioner sought recovery on the following causes of action: suit on a sworn account; negligent breach of contract; tortious interference with contract; *quantum meruit*; fraud; unspecified but constitutionally mandated torts; statutory and common law bad faith and exemplary damages.

It is important to keep in mind what Petitioner's suit is not. It is not an action brought by the injured employee, Bradley Graves, against Nationwide seeking workers' compensation benefits. That issue was resolved by settlement. Furthermore, it is not a lawsuit brought by Graves seeking actual damages for breach of a compromise settlement agreement. In fact, it is not a lawsuit seeking any damages on behalf of Graves at all. Most

importantly, this suit is more aptly characterized as a suit for breach of the duty of good faith and fair dealing brought by Petitioner that does not seek any relief under the workers' compensation laws of Texas as they then existed.

SUMMARY OF THE ARGUMENT

I. This case presents no issue appropriate for the Court's exercise of its discretionary jurisdiction. Contrary to Petitioner's assertions, this is not a "direct action" within the meaning of 28 U.S.C. § 1332(c) and thus Respondent is not deemed to hold the same citizenship as its insured, Noel Furniture. Although arising from the then-existing Texas statutory workers' compensation scheme, Petitioner's suit is in actuality a bad faith suit combined with other state common law causes of action to which § 1332(c) does not, and was never intended, to apply.

II. Summary judgment was properly granted for Respondent because of Petitioner's failure to raise any genuine issues for trial.

REASONS FOR DENYING THE WRIT

Petitioner fails to satisfy the criteria traditionally applied by the Court in determining whether to grant a petition for writ of certiorari. The court of appeals below properly recognized that Petitioner's lawsuit was a bad faith action to which 28 U.S.C. § 1332(c) does not apply, Petitioner's disingenuous representations to this Court notwithstanding. Furthermore, the summary judgment evidence introduced by Respondent affirmatively proved that there was no genuine issue of fact for trial, and hence summary judgment was properly granted.

I.

SUITS FOR INSURER BAD FAITH ARE NOT DIRECT ACTIONS WITHIN THE MEANING OF 28 U.S.C. § 1332(c).

28 U.S.C. § 1332(c) governs diversity of citi. nship and sets up legal fictions for destroying diversity in specific, limited circumstances. In relevant part, § 1332(c)(1) pertains to insurers against whom "direct actions" are brought:

> For the purposes of this section . . . in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business[.]

28 U.S.C. § 1332(c)(1).

The intent of Congress in enacting and amending § 1332(c)(1) was to "defederalize" jurisdiction over lawsuits in states and territories which permit plaintiffs to bring "direct actions" against the insurers of their alleged tortfeasors, instead of suing the tortfeasors and then becoming judgment creditors of the tortfeasor's liability insurer. *Williams v. Liberty Mutual Insurance Company*, 468 F.2d 1207, 1209 (5th Cir. 1972). The basis for direct actions under § 1332(c) is derivative liability, where a claim is brought directly against the insurer when it could have been brought against the insured instead. The claims brought by Petitioner involved no such liability. Instead,

Petitioner sought to impose liability directly against Respondent for its own actions rather than the actions of its insured.

Federal courts of appeal have consistently and correctly held that actions alleging insurer bad faith are not "direct actions" within the meaning of § 1332(c). *See Searles v. Cincinnati Ins. Co.*, 998 F.2d 728, 730 (9th Cir. 1993); *Tuck v. United Services Automobile Association*, 859 F.2d 842, 847 (10th Cir. 1988); *Fortson v. St. Paul Fire & Marine Ins. Co.*, 751 F.2d 1157, 1159 (11th Cir. 1985); *Beckham v. Safeco Ins. Co. of America*, 691 F.2d 898 (9th Cir. 1982). As the *Beckham* court correctly pointed out:

> Courts have uniformly defined the term "direct action" . . . as those cases in which a party suffering injuries or damages for which another is legally responsible is entitled to bring suit against the other's liability insurer without joining the insured or first obtaining a judgment against him. Thus, "unless the cause of action urged against the insurance company is of such a nature that the liability sought to be imposed could be imposed against the insured, the action is not a direct action." [For this reason, no suit is a direct action when it is] seeking to impose liability on [an insurer] for its own tortious conduct, i.e., [for the insurer's] bad faith refusal to settle....

Beckham, 691 F.2d at 901-902. *Accord, John Cooper Produce Co., Inc. v. Paxton Nat'l Ins. Co.*, 774 F.2d 433, 435 (11th Cir. 1985) ("[T]he statute will defeat diversity jurisdiction only if the claim which the third party has against the insured — for intentional tort, negligence, fraud, etc. — is the same one asserted against the insurance company as within the zone of primary liability for which the company issued the policy.").

"Direct actions" are lawsuits in which tort victims are entitled to bring suit against a tortfeasor's insurer without joining the tortfeasor or first obtaining judgment against him. *Beckham*, 691 F.2d at 901-902. By analogy, workers' compensation actions have been classified as "direct actions" on several occasions. However, there is no "direct action" where an insured sues his own carrier for bad faith. It logically follows then that a third party such as Petitioner who is a stranger to the policy does not bring a "direct action" against an insurer for damages resulting from the insurer's own conduct and not the conduct of its insured.

II.

SUMMARY JUDGMENT WAS PROPERLY GRANTED FOR RESPONDENT BECAUSE RESPONDENT'S PROOF CLEARLY ESTABLISHED THAT THERE WAS NO GENUINE ISSUE FOR TRIAL.

Petitioner fails to recognize that the summary judgment in this case was based on affirmative evidence introduced by Respondent in support of its motion as well as the failure of the Petitioner to come forward with evidence demonstrating a prima facie case. The motion for summary judgment and accompanying evidence established as a matter of law that either Petitioner had no legally cognizable claim based on his position as a stranger to Respondent's policy or that at least one of the elements of each of the causes of action asserted by Petitioner were conclusively established against him.

CONCLUSION

Accordingly, for all the foregoing reasons, Petitioner's request for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL W. MINTON
Counsel of Record
THE BARBKNECHT FIRM, P.C.
Attorneys for Respondent
12222 Merit Drive, Suite 990
Dallas, Texas 75251-2227
(214) 385-1818

Supreme Court, U.S.
FILED
NOV 15 1995
CLERK

(3)

No. 95-538

In The

Supreme Court of the United States

October Term, 1995

In re: BERNARD J. DOLENZ,

Petitioner,

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

BERNARD J. DOLENZ
6102 Swiss Avenue
Dallas, Texas 75214
(214) 821-0220
TX Bar No. 05957750
Petitioner, Pro Se

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

5 pp

PETITIONER'S REPLY BRIEF

TO THE HONORABLE SUPREME COURT:

The Petitioner, Bernard J. Dolenz, respectfully requests this Honorable Court consider this his Reply to Respondent's Brief in Opposition.

Nationwide appears to be in massive denial by asserting that this is NOT A WORKER'S COMPENSATION CASE, and therefore not a "direct action" within the meaning of 28 U.S.C. Section 1332(c).

That this is a Worker's Compensation case plus more is made clear in Plaintiff's First Amended Complaint:

" . . . Bernard J. Dolenz will be suing the Defendant as Bernard J. Dolenz, ("Dolenz"), on behalf of Bradley Graves as assignor, as well as the beneficiary of the workers' compensation benefits as allowed by common law and by statute . . .

2. The Texas Workers' Compensation Commission (TWCC) Award was in favor of Dolenz but was incorrect in the amount awarded. That award was timely appealed by the carrier as well as Dolenz within 20 days from the date of giving of such award . . .

Dolenz has done all conditions precedent necessary to maintain this action . . .

. . . The $25,624.51 is the amount due and owing for the "underlying workers' compensation claim". The amount of the account is just as the prices charges are in accordance with the usual, customary or reasonable charges for like services in Dallas County . . .

. . . The carrier recognized the doctor/patient relationship with Bradley Graves and Dr. Bernard J. Dolenz, and indicated and noticed Dr. Dolenz that the carrier IS RESPONSIBLE FOR ALL REASONABLE AND NECESSARY MEDICAL TREATMENT RENDERED IN CONNECTION WITH THE INJURY . . . EXHIBIT "E". (Emp. given in Complaint).

. . . Under the circumstances Carrier was reasonably notified by reports and billings and were noticed that Dolenz in performing such services was expecting to be paid by Carrier pursuant to the W/C Act.

WHEREFORE PREMISES CONSIDERED, Bernard Dolenz respectfully prays that Carrier pay damages as follows:

. . . k. Dolenz prays also that the workers' compensation award be set aside as the final decision and award of the Texas Worker's Compensation Commission entered on November 18, 1992 did not reflect the full account due for the reasonable and necessary care and treatment given Mr. Bradley Graves; and . . . "

This is a W/C case; but it is also more because the Carrier did not pay for the services rendered Bradley Graves for his dorsal spinal stenosis, a very painful problem, and refused him his prescriptions and neurosurgical consultations, elevating this W/C to additional causes of action for such egregious and abhorrent conduct. Unfortunately, Nationwide is not the only carrier culpable of this type of bad conduct, impacting adversely upon this nation's health care.

Summary Judgment was not only improperly granted because it lacked diversity jurisdiction, but there were genuine issues which were not handled such as the appeal of the W/C award as allowed by TWC Act, Article 8307, Sec. 5; the sworn account; the determination of the fees due pursuant to the ambiguous phrase "reasonable and necessary" contractual language; and the various torts alleged. As this court knows, summary judgment is rare because issues of "negligence", "due care" and "proximate causation" usually require jury resolution of competing inferences. WESTFALL V. ERWIN, 484 U.S. 292, 102 S. Ct. 580 (1988); ZIMZORES V. VETERANS ADMIN. (5th Cir. 1985), 778 F2d 264. The ambiguity of "reasonable and necessary" in a contract relationship with W/C cases are susceptible to more than one reasonable interpretation and raises triable issues. SOUTHERN NATURAL GAS CO. V. PURSUE ENERGY (5th Cir. 1986), 781 F2d 1079, 1081.

CONCLUSION

This is a workman's compensation case, contrary to the assertions of Nationwide and is a "direct action" case within the meaning of 28 U.S.C. Sec. 1332(c). This case lacked diversity and should be remanded back to state court. If this Court believes that Nationwide misstated and was disingenuous in its representations, this Petitioner would seek sanctions pursuant to Rule 11 and any other relief that this Honorable Court would consider equitable.

Respectfully submitted,

BERNARD J. DOLENZ, J.D., M.D.
6102 Swiss Avenue
Dallas, Texas 75214
(214) 821-0220
Texas Bar Card No. 05957750